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Mortgage clause

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MORTGAGEE CLAUSE

AN ADDRESS

Delivered before the One Hundred and
Fifth Meeting

OF

The Insurance Society of New York

ON

Tuesday, March 2nd, 1915

BY

Mr. Leo Levy

Mortgagee Clause.

In the discussion of the provisions found at lines 56-59 of the Standard Policy we deal with a subject-matter of great interest to the insuring public by reason of the sums representing investments in mortgage loans. Statistics of this class of capital indicate that at least 60 per cent. of all permanent realty improvements represent borrowings secured by mortgage. Such investments leave with the debtor the control of the property subject to the lien or encumbrance.

It is historically interesting to trace the gradual development of the means taken to indemnify such investments against fire loss. Suffice it to say for the purposes of this paper that many years ago the mortgagee interest took out its own insurance embraced in a separate and distinct contract with the insurers; thereafter and at an uncertain period the indemnity to the mortgagee began to be furnished in the form of simple loss payable clauses written on the policy and reading to a named mortgagee, or by the attaching of riders in the form of mortgagee clauses.

Mortgages are a serious business to the holder, somewhat more so for the unfortunate debtor; but as to the insurance company writing the business there is not a word that can describe or define it. In fact, the insurance man who might find it necessary in a given instance to declare what rights or remedies his company has would be at a loss where to begin or end, and the lawyer who wants to tell the insurance man what to do finds a labyrinth of legal precedent, text book declarations and practical demonstrations wholly at variance with the language employed in the contract.

In this situation what can be said to clearly lay before you the problems arising from the contract forms as viewed in the light of Court decision?

If this paper serves no other purpose than to point out the dangers to the company I think its usefulness will have been proven even though it does not decisively declare what will hereafter prove to be the law since it must be borne in mind that so long as Courts exist there will arise questions between mortgagor,

mortgagee and insurer calling for reversal of that which we now accept or regard as settled.

There are forty-eight States each having intermediate Courts and Courts of last resort where from time to time definition of the rights of the parties concerned has been attempted. Also, we have the Federal Courts which from time to time have struggled with the problems mentioned. Some of these States by Legislative enactment have made the language of the contracts compulsory, others have in the same way declared the rights of mortgagees upon insurance moneys without the formality of contractual privity.

The varying conditions of the statutory forms of policy are shown by a comparison of the Massachusetts, New Hampshire, New York and (for recent example) the California Standard policies. True it is that the New York form is that most commonly used and there we deal with the lines reading:

> "If with the consent of this company an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions *hereinbefore* contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such insurance as shall be written upon, attached or appended hereto."

California has expressly omitted these words. It was discovered that they did not mean to the Courts what was plainly intended.

How do these quoted conditions control, agree with or modify the simple loss payable clause so-called or the full mortgagee clause with or without contribution and what has been judicially declared to be the rights and remedies arising from such forms? In attempting to answer this question I shall not discuss the forms of Court procedure both in law and in equity as they are laid down and declared in the different States and Federal Courts. They directly affect the protection and enforcement of the insurers' rights but are too technical in character and scope to be of much assistance except to the practicing lawyer. These differing forms of legal procedure will often be found to be of great, if not controlling, importance in the practical solution of the questions constantly arising, as are, also, the manner and means of effecting cancellation of the contract so as to remove the mortgagee interest and enforce the right of subrogation under any of the forms mentioned.

I shall not refer at length to these subjects of cancellation and subrogation for the reason that during the course of lectures outlined by the Society they will be embodied in papers directly and fully dealing therewith.

Liability of Mortgagee for Premium.

The policy having been written at the instance and upon the credit of the mortgagee the premium liability will, of course, fall upon such interest. However, where the mortgagor-owner has secured the insurance in the first instance the obligation of paying therefor falls upon such owner and the mortgagee will not be liable until after reasonable notice from the company of default by the owner and then only if the mortgagee has retained the policy. Such premium liability will necessarily be limited to the term of the insurance following such retention.

Cancellation.

As to the mortgagee protected by the simple loss payable clause, the provisions for cancellation found in the policy undoubtedly apply and the usual and customary method would have to be followed. This is actual notice of cancellation in definite language with the added precaution of a lawful tender of unearned premium even though the premium may have been paid by the mortgagor-insured.

Where cancellation of the policy is sought as to the interest of a mortgagee named in the mortgagee clause attached we have a difficult and complex situation to deal with due to the variance of language found in the policy and in the mortgagee clause. The policy reads five days notice; the clause reserves the right of cancellation upon the policy terms but provides that even though it be cancelled as to the assured it continues in force for the benefit of the mortgagee subject to separate cancellation notice of ten days to be given to the mortgagee. Whether or not this means ten days additional to the five is uncertain because there immediately follows language indicating that five days separate notice shall be given. Evidently the intent was to cancel the entire insurance interests both of mortgagee and insured upon five days notice to each, or the interest of the insured upon five days notice, and that as to the mortgagee interest cancellation without notice was effectual but the insurance was to cease after an automatic ten days grace had been granted.

Such notice of cancellation to the insured without actual notice to the mortgagee is, undoubtedly, a nullity since the neglect

of the insured under the mortgagee clause could not affect such interest. Again there may arise the question as to voluntary surrender for cancellation by either mortgagor or mortgagee and how far the other party would be affected thereby. It should be borne in mind that the rights of neither party i. e. mortgagor or mortgagee, can be adversely affected in the absence of notice in fact or ratification or estoppel after such notice.

It might be proper to suggest that in practice, if cancellation is sought, actual notice should be given to all parties *named* and tender of unearned premium should be made to all; and if surrender be attempted by any, notice should be given to all parties of acceptance of such surrender.

Subrogation.

The subrogation clause of the mortgagee rider, irrespective of the policy condition, is to be regarded as a controlling element of the indemnity to the mortgagee and since the discussion of the subject of subrogation is limited it should be said that the claim of the right of subrogation is based upon something more substantial than the mere assertion of invalidity of the policy contract as to the insured (see O'Neil v. Franklin Ins. Co., 159 App. Div. 314, which case will hereafter be referred to. That case is most interesting as a clear exposition of the difficulties arising on account of the forms of legal procedure heretofore referred to).

It might be plainly stated that if the mortgagee with knowledge of the facts does anything to deprive the company of its right of subrogation there is *lost* to the mortgagee the enforcement of the collection of indemnity; however, this does not relieve the insurer of the obligation of giving *seasonable* and *reasonable* demand for subrogation.

The Right to Indemnity.

Under the clauses considered the right to indemnity implies a real money loss. It has been held that where the premises insured were restored to the condition in which they were before the fire or damage or loss without expense or obligation on the part of any party to the policy, the insurer would not be liable (Friemansdorf v. Ins. Co., 1 Fed. Rep. 68). By way of contrast we find the case of King v. Ins. Co., (Mass. 7 Cushing, 1) to the effect that even though the mortgagee suffers no monetary damage or loss to the security and if in fact there was a damage the company would have to pay.

This brings up for discussion the provisions of the simple loss payable clause and the mortgagee riders:

"Loss, if any, payable to...................., mortgagee"
or the added words

"as interest may appear."

As to the words "as interest may appear" these words in the light of the cases hereinafter discussed, in my opinion, add neither weight nor substance to the effect legally to be given to the simple loss payable clause. For many years it was the settled law of the State of New York that the designation by the simple loss payable clause of an appointee mortgagee to receive money payment gave such mortgagee no right other than being in a receptive mood and that after all matters had been threshed out between the insured and the company (and only if the policy was valid and the company ready to pay) could such mortgagee require payment.

There has recently been decided in New York State the case of MacDowell v. St. Paul Fire & Marine Ins. Co., found in 207 N. Y., p. 482, March 1913 Term. The Court in effect held that the words

"loss, if any, first payable to John MacDowell, mortgagee, as his interest may appear"

without any mortgagee clause or rider attached meant that it was the intention of the parties that the plaintiff as mortgagee should have an interest in the insurance superior to that of the owner; and where such owner declined and refused to make proofs of loss that did not deprive MacDowell, the mortgagee, of his right of recovery under the contract. The Court said that the *contention* that the interest of the mortgagee would be defeated by the wilful failure or neglect of the mortgagor to perform conditions precedent to the contract was not sound and the very object and purpose of the provisions of the contract with respect to the insurance company assenting to the insurance of an interest other than that of the owner and the use of the words "loss payable to a mortgagee, as interest may appear" meant more than the declaration of a mere naked appointee and that the plaintiff-mortgagee had a vested legal interest in the contract and a settlement of the loss made between the mortgagor-owner and the defendant insurance company without the knowledge or consent of the mortgagee would not have been a bar to a recovery by the mortgagee and the latter was a necessary party to the action brought by the mortgagor.

The opinion of Mr. Justice Miller in this case reviews most, if not all, of the recent cases in New York State construing the lines 56 to 59 of the policy and the Court decided that the con-

struction of the contract contended for (that is, that the payee-mortgagee was merely a designated appointee-payee of a sum to be ascertained under all of the conditions of the policy) defeats the purpose intended by lines 56 to 59 and that the arbitrary refusal of the owner to make proofs of loss could not affect and destroy the interest of a mortgagee. The Court said that it was unreasonable after a loss had occurred that the interest of the mortgagee designated in the manner indicated to receive payment should be subject to the caprice of the owner and that was equally true whether there was a mortgagee clause or merely the endorsement quoted and that there were two constructions which were possible: the first, that the mortgagee designated merely by loss payable clause was the insured and hence *required to make proofs of loss;* or, secondly, that every mortgagee, however described, whether by merely the simple loss payable clause or the full mortgagee clause, was not an insured and that the word "insured" used in the contract applied *only* to the owner, the one to whom the policy was issued; and that the latter construction did not do violence to any language of the contract but tended rather to give *some* effect to all of its provisions and at the same time to carry out its primary purpose. (The Court was unanimous in its decision).

We next come to the questions arising under the policies having attached thereto the full Standard Mortgagee Clause *without contribution:*

> "The interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner nor by foreclosure or other proceedings nor by change in the title or ownership nor by occupation of the premises for purpose more hazardous than are permitted by the policy, and provided that in case the mortgagor or owner shall neglect to pay the premium the mortgagee on demand shall pay the same, provided, also, that any change of ownership, occupancy or increase of hazard coming to the knowledge of the mortgagee, trustee, etc., shall be notified to the company and unless permitted by the policy it shall be noted thereon and the mortgagee on demand shall pay the premium for such increased hazard for the term of the use thereof."

As far back as the year 1878 in the well known case of Hastings v. Westchester Fire Ins. Co., 73 N. Y., the settled and declared policy of the Courts of the State of New York was to the effect that the attaching of the mortgagee clause to the policy insuring a designated mortgagee, trustee or third party having an insurable interest, was the creation of a separate contract of insurance by which the interest of the party named in the mortgagee

clause would remain unaffected by any act of the owner-mortgagor or insured, and that the separate contract rights thus established were to be determined within the corners of the mortgagee clause. The lines 56-59 of the Standard Form policy although adopted in 1886 were not called up for judicial construction in this State until the decision of the Court of Appeals in the case of Heilbrunn v. German Alliance Ins. Co., which I shall designate as the first Heilbrunn case or Heilbrunn No. 1 (year 1911, 140 App. Div., 557, aff'd 202 N. Y., 610). In that case the Court of Appeals unanimously held that the Standard Policy having attached to it a mortgagee clause in the form authorized by law, in so far as the interest of the mortgagee was concerned, stopped with the period mark after line 59 and that all of the conditions which I might term "conditions precedent" required to be performed of an assured after a loss had no application to such mortgagee interest, not even including the short Statute of Limitations, to wit: twelve months, but that a mortgagee having a mortgage interest at the time of the loss which interest *continued* could wait the full period of six years without doing anything at all in the meantime except sleep on the rights given by the mortgagee clause and then serve the summons and complaint demanding payment of the loss; that no matter what happened between that time, to wit: the day of the fire and the bringing of the action, the right of the mortgagee was in no wise impaired or harmed. This was an eye-opener although decisions to the same effect and to the contrary had been rendered by the Courts of other States. It means as I interpret the Courts declaration, that no matter what happens as between the company and the owner after a loss, unless the mortgagee interest was a direct party thereto and chargeable as a matter of *fact* with notice, the mortgagee interest remains unaffected. Of course, this carried away the supposed necessity on the part of the mortgagee of giving notice of loss, making proofs of loss, submitting to appraisal, ascertainment of loss, furnishing any documentary proof or doing any of the things which we lawyers call "conditions precedent." The remedy, the Court said in its most illuminating utterance, lay in application to the Legislature for change in form of the policy and that the word "hereinbefore" found in lines 56 to 59 meant that the conditions before that numerical definition were the only ones binding upon the mortgagee interest.

It cannot be gainsaid or disputed that the law is that if at the inception of the contract, whether of policy or mortgagee clause, the mortgagee has knowledge of facts which render void

as to the insured the entire policy, the interest of the mortgagee is directly and adversely affected thereby. This has been declared in a case never overruled or modified either by inference or direct reference, known as the case of the Genessee Savings & Loan Assn. v. U. S. Fire Ins. Co., 16 App. Div. 587. In that case the policy condition with respect to sole and unconditional ownership had been violated at the inception of the contract by the fact that the assured and his wife were the owners by the entirety of the property although the policy read to the husband as sole and unconditional owner, and the Court said that the plaintiff Building & Loan Association named as mortgagee under full mortgagee clause

> "must have known when they took their mortgage that M., the insured, was not the sole and unconditional owner of the property described in the policy, and yet with this knowledge they failed to notify the insurance company of the real condition of the title or to take any measures for the correction of the policy in respect thereto. Inasmuch as the insurance was for the exclusive benefit of the plaintiff Loan Association whose officers appeared to have assumed direction and control of the matter it would seem that if the plaintiff was to be furnished any indemnity thereby its officers were bound by every consideration of good faith to disclose to the insurance company defendant information they possessed respecting the mortgagor's title. This they omitted to do and such omission made the act or neglect complained of that of the plaintiff mortgagee instead of the mortgagor."

Also if the company can show that the mortgagee had knowledge of increase of hazard and did not communicate such knowledge to the company recovery can not be had by the mortgagee.

This brings us to consider the clauses with respect to contribution. The contribution clause of the Standard New York policy reads as follows:

> "This company shall not be liable under this policy for greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto." (Lines 96 to 101).

The mortgagee rider has the following language:

> "In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, *issued to or held by any party or parties having an insurable interest therein whether as owner, mortgagee or otherwise.*"

We find a direct conflict of law on the construction to be placed upon this language in the mortgagee clause and the effect of the language in the policy as applied to mortgagees.

In the well known cases of Hartford Fire Ins. Co. v. Williams, Vol. 63 of the Federal Reporter, page 925 (U. S. Circuit Court of Appeals) and Eddy v. London Assurance Co., 143 N. Y., page 311 (New York Court of Appeals such conflict is found, the United States Court decided that the words of the contribution clause in the mortgagee rider meant exactly what they said. The lower Court first held that the contribution clause was not effective and could not defeat a full recovery against the Hartford Fire Ins. Co. This the Appellate Court declared was unsound, saying:

> "We can conceive of no other object that the parties could have had in using the words *'issued to or held by any party or parties having insurable interest therein'* unless it was to avoid the very construction of the clause which the Circuit Court appears to have adopted. As before remarked the concluding words of the paragraphs seem to have been added out of *abundant caution* that there might be no ground upon which to insist that the right to pro rate was limited to policies held by the mortgagee or for his benefit * * *. In construing a contract like the one now in hand it is our duty to look to all the provisions of the agreement and to give effect to what seems to have been the obvious intent and meaning of the parties. We would not be justified in ignoring an agreement in one part of the instrument *which is as clearly expressed as language could well express* it merely because it limits to some extent the scope of general language employed in another part of the instrument."

The Court decreed that the plaintiff in error, the insurance company, was entitled to have a construction of the contribution clause which limited its contribution to the loss to the company's pro rata sum apportioned amongst all the insurance.

To the contrary was the New York decision.

The Eddy decision was handed down by the State Court of Appeals almost simultaneously with that of the U. S. Court in the Williams case and it may be of interest to read from the decision of Mr. Justice Peckham, concurred in by all of the Judges. The Court there said:

This decision in certain aspects properly comes under the head of "Subrogation;" at the same time it declares the law of

the State to be that since the right to indemnity was dependent upon a money loss actually accruing to the mortgagee, if the mortgagee suffered no such loss because the debt was fully paid and the security discharged, to wit: the mortgage cancelled, there existed no right against the insurer under the mortgagee clause. In this connection it is also necessary to call to your attention the case of O'Neil v. Franklin Fire Ins. Co., heretofore mentioned as decided by the Supreme Court, Appellate Division of the Fourth Department in November, 1913, Vol. 159 App. Div., p. 314, and there the Court held, after fully discussing all of the old and recent decisions construing the mortgagee clause, that the period of limitation (that is, the twelve months) did not apply. That case is, of course, more on the direct point of subrogation and form of Court procedure than on the other propositions arising under the mortgagee clause, but its effect is to broaden the scope of the first Heilbrunn case. (The O'Neil case has not yet been decided by the Court of Appeals but will be so decided probably within a month of two).

On the question of the continuation of the interest of the mortgagee as being necessary to sustain an action under the mortgagee clause and the incapacity of the mortgagee's assignee after satisfaction of the mortgage to acquire any right, I call to your attention (in addition to the second Heilbrunn case) the decision of the Court of Errors and Appeals of New Jersey in the case entitled Kupfersmith v. Delaware Ins. Co. In that case at the time of the fire there were several policies issued to the assured and to a mortgagee named. After the fire the mortgagee assigned the mortgage and the bond but did not transfer any interest in the policy or right of action for the loss caused by the fire. Thereafter the first assignee of the mortgage assigned the mortgage by mesne assignments to a subsequent or second mortgagee who afterwards secured or attempted to secure from the original mortgagee an assignment of the right of action under the policy. The Court held that the last mentioned assignment of the right of action was made after the original mortgagee had parted with any right, that the right of action *was purely and wholly personal to the original mortgagee* and that the right of recovery under the mortgagee clause was limited to the original mortgagee and that when he assigned the mortgage without assigning the right under the policy he parted with his entire interest in the property and in the policy and thereafter had no interest in the property insured or rights under his mortgagee clause. The Court said:

"What he was then undertaking to do (that is, after he had parted with the mortgage) was to assign a chose in action when he had nothing to assign, for manifestly he could not have recovered anything from the defendant insurance company after the transfer of his mortgage even if he had that right before, because he then had no debt or security therefor which he could enforce against the defendant company. The holder of a mortgage protected by a mortgagee clause is not bound to collect from an insurance company the amount of the loss insured against, for the remainder of the property may be a sufficient security for his mortgage. He may call upon the insurer to make him good or he may rely upon the diminished value of the property as a security for his mortgage and when he disposes of his mortgage he has no interest which he may call upon the insurer to make good. He becomes a stranger to the matter without any rights to subsequently assign."

As a rather startling example of the extremes to which the Courts will go and do go in protection of a mortgagee or third party interest under a Standard Form of policy and mortgagee riders I call your attention to the following case: in New York State a company issued its policy (with full mortgagee clause attached) insuring the premises therein designated and mortgagee named in the clause; the mortgagee transferred his interest; the insured named transferred his interest; the new owner of the mortgage (that is, the new mortgagee) applied through his agents for a change of notation of interest to be made to him *as the new owner*. The insurance company did exactly as it was requested to do—endorsed the policy continuing the reading of the mortgagee clause to the old mortgagee and complied with the request to change the interest of the new mortgagee to that of owner. So far as the records of the company were concerned there had been transfer of interest from one owner to the other; *in fact*, there had been a transfer of interest from one mortgagee to another. The policy was void in fact as to the owner. The mortgagee received the policy in its endorsed form from his own agents accompanied by a letter calling his attention to the fact that he was named *as owner* in the policy and that the company had done exactly as it had been directed to do by the mortgagee and his agents and for over two years he never looked at the policy; about a year after the notation of change of interest the premises were damaged by fire. In an action brought for reformation *three* years thereafter the Court decreed that the reformation should be had by changing the interest from the insured named as owner to that of mortgagee, *with no greater equity as the foundation for such decree than the mortgagee's own negligence.*

Up to the present time the number of Judges who have written opinions is evenly divided. The case very shortly will come up for decision in the Court of Appeals but the finding is directly contrary to that in the case of Gillett v. Liverpool & London & Globe Ins. Co., in the 73 Wis. Reports, page 203, and to all of the cases bearing upon the remedy of reformation. If held good law by the Court of Appeals its effect will be to take from the companies the right of selecting the *person* who shall be covered by the mortgagee clause.

It may be stated that the Courts in view of the lack of control over the subject-matter of insurance will afford to the mortgagee interest every possible manner of protection so long as that interest exists and the companies should not be too critical of their judicial utterances in that respect as it must be borne in mind that security holders in all instances in good faith rely fully upon the promise of indemnity found in the contract, having neither possession nor ownership of the property which is subject to their lien and the subject-matter of the risk, and that the fact that there is potentiality for fraud, collusion and evil practice under the mortgagee clause does not alone require a narrow construction of the rights of the third parties under the provisions of the Standard policy and mortgagee clause.

In conclusion I might repeat what has been so forcibly said by an able and eminent authority upon insurance:

> "If there are any rights or advantages which the mortgagee does not possess, it is either because he has not yet discovered them or has not gone after them and more remarkable still is the fact that for all this the mortgagee pays nothing whatever. He gets without money and without price a contract which the mortgagor or owner of the best risk in the land cannot buy at any price."

REFERENCES.

Cooley's Briefs. Richards on Ins. Clement's Digests. Cases cited in the text and Court decisions there referred to; Legislative Enactments.

NOTE.

O'Neil v. Franklin Fire Ins. Co., will be argued in the N. Y. State Court of Appeals in October, 1915.

The case of Equitable reformation cited has since been reversed by the Court of Appeals in Solomon v. North British & Fire Ins. Co., N. Y. Court of Appeals June, 1915.

On the question of co-insurance the Supreme Court Appellate Division Second Department the case of Hartwig v. American Insurance Company, N. J., has just decided that the mortgagee is bound by the co-insurance clause to the same extent as the assured owner.

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